IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 619

STEVE ASHTON,

Petitioner,

—against—

COMMONWEALTH OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE COMMONWEALTH OF KENTUCKY

BRIEF FOR THE PETITIONER

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Opinions Below

Petitioner was found guilty after a trial by jury in the Perry Circuit Court of Kentucky (R. 8). The Trial Court did not file an opinion when the judgment of conviction was entered.

The judgment of conviction was affirmed by the Court of Appeals of Kentucky. The opinion of the majority (R. 144-158) and the dissenting opinion (R. 158) have not been officially reported.

Statement of the Grounds of Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

The judgment of the Court of Appeals of the Commonwealth of Kentucky sought to be reviewed, was entered June 18, 1965. The time for filing a Petition for Writ of Certiorari was extended to October 16, 1965, by an order made by Mr. Justice Stewart (R. 159). The Petition for a Writ of Certiorari was filed September 27, 1965. The order allowing certiorari was granted January 17, 1966 (R. 160).

The Constitutional Provisions and Statutes Involved

The Constitution of the United States,

First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The constitutional provisions of the Commonwealth of Kentucky and the Statutes that are involved are:

The Constitution of the Commonwealth of Kentucky.

"§9. *Truth May Be Given In Evidence In Prosecution for Publishing Matters Proper for Public Information; Jury to try Law and Facts in Libel Prosecutions.* In prosecution for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libel the jury shall have the right to determine the law and the facts under the direction of the Court as in other cases."

Kentucky Revised Statutes, Vol. I, Constitution, p. 2, Legislative Research Commission (1960).

Kentucky Statutes
Chapter 431, Crimes and Punishment.

"§431.075. *Common Law Offenses, Penalties for.* Any person convicted of a common-law offense, the penalty for which is not otherwise provided by statute shall be imprisoned in the County jail for a term not exceeding twelve months or fined a sum not exceeding five thousand dollars or both."

Kentucky Revised Statutes, Vol. III, Chapter 431, p. 2, Legislative Research Commission (1960).

Kentucky Code of Criminal Procedure
Title IX Appeals; Article 2. Misdemeanors

§347 *Jurisdiction in Misdemeanors*

"That a defendant against whom a judgment has been rendered in the Circuit Court in all penal actions and prosecutions for misdemeanors in which a judgment was for a fine for as much as fifty dollars, or for imprisonment exceeding thirty days shall have the right to have such judgment reviewed by the Court of Appeals; and the Commonwealth shall have the same right * * *"

Kentucky Revised Statutes, Vol. III, Criminal Code, p. 61, Legislative Research Commission (1960).

The Questions Presented for Review

(1) Whether the common-law crime of criminal libel, of which Petitioner was convicted in Kentucky, was unconstitutionally vague as it was interpreted at the time of Petitioner's trial, and as it was interpreted, by the Court of Appeals of the Commonwealth of Kentucky on Petitioner's appeal to that court.

(2) Whether the Kentucky common law of criminal libel violates the constitutional guarantee of freedom of the press in punishing as a crime, personal defamation that does not affect the community in any significant way.

(3) Whether Petitioner was denied due process by the Trial Court's instruction to the jury that Petitioner was on trial for the crime of issuing a derogatory statement that might cause a breach of the peace, thus attributing

guilt to Petitioner if the jury found that others might be stirred to unlawful violence by his writing.

(4) Whether the affirmance of Petitioner's conviction by the Kentucky Court of Appeals under a definition of the crime of criminal libel, different from, and in conflict with, the definition applied by the Trial Court, constituted a denial of due process and of equal protection of the laws, and of Petitioner's right to a hearing, on appeal, on the question of the constitutionality of the law as it was applied in his case.

(5) Whether Petitioner was deprived of due process and denied his constitutional right of expression, by his conviction of criminal libel following a general verdict, when it was shown that one of the statements said to be libellous, was in fact true.

(6) Whether convicting Petitioner of having libelled public officials in respect to the performance of their official duties, without proof that Petitioner was motivated by ill will, and without proof that Petitioner was aware of the falsity of the statements attributed to him, was a denial of due process and a violation of Petitioner's right to freedom of the press.

(7) Whether evidence that Petitioner failed to ask the government officials who had been allegedly defamed, if the statements about them were true, established malice sufficiently "to remove the constitutional shield from criticism of official conduct".

(8) Whether convicting Petitioner of criminal libel without proof that he published the libel voluntarily or with malice, or in a manner likely to affect the public, violated the constitutional guarantee of freedom of the press.

(9) Whether a conviction and punishment of a person for making inaccurate and derogatory statements about the official conduct of public officials violates the First and Fourteenth Amendment guarantees of freedom of the press.

Statement of the Case

Petitioner seeks to review a judgment of the Court of Appeals of Kentucky affirming his conviction of the common-law crime of libel.

The following, with minor changes, is the statement of the facts to the Court below, to which the attorney for the Commonwealth of Kentucky agreed.

The Petitioner, Steve Ashton, was indicted for publishing on March 22, 1963, "a false and malicious publication" tending to "degrade or injure Sam L. Luttrell, Charles E. Combs and Mrs. W. P. Nolan."[1] At the time of the alleged libel, Sam L. Luttrell was Chief of Police of Hazard, Kentucky (R. 19), Charles E. Combs was Sheriff of Perry County (R. 70) and Mrs. Nolan was co-owner and co-publisher of a newspaper, the Hazard Herald (R. 48). The alleged libel appeared in a mimeographed pamphlet entitled "Notes on a Mountain Strike" (Commonwealth Exhibit 1, R. 127).

Ashton was 20 years old at the time of the alleged offense (R. 101). He had been a student at Oberlin College in Ohio for two and a half years, and left college in February 1963 to come to Hazard, Kentucky (R. 101). There was at the time, a bitter labor dispute in that area between

[1] An indictment charging Ashton with criminally libelling Mr. Nolan was dismissed (R. 2, 16, 122-126).

union and non-union miners (R. 154) and Ashton came in response to an appeal for food, clothing and help for unemployed miners (R. 104). The appeal was made on a program telecast over a national television network (R. 104).

Ashton was charged with having made the following defamatory statements about Police Chief Luttrell in the pamphlet "Notes on a Mountain Strike":

> "'Six weeks ago I witnessed a plot to kill the one pro-strike city policeman on the Hazard Force. Three of the other cops were after him while he was on night-duty. It took five pickets guarding him all night long to keep him from getting killed, but they could not prevent him from being fired, which he was three weeks ago. Another note on the City Police: The Chief of the force, Bud Luttrell, has a job on the side of guarding an operator's home for $100 a week. It's against the law for a peace officer to take private jobs'" (R. 122).

A number of the statements were true. It was shown that people known to Chief Luttrell had considered killing a police officer who sympathized with the striking miners. Kilburn, the officer in question, testified that he had been a Police Lieutenant on the Hazard force, working under Luttrell (R. 109). He said that Chief Luttrell told him that he (Kilburn) would be killed by two men, one a policeman, unless he resigned (i.e., "made a move") (R. 109). On direct examination Luttrell denied that he told Kilburn he would be killed "if he didn't make a move" (R. 120) but when cross-examined by the Court, Luttrell admitted that he told Kilburn that his life might be in danger because of statements he had made (R. 121).

Luttrell suggested that he was libeled by the statement that one night five pickets were needed to guard a policeman. Luttrell testified, in response to a question, that there was no truth whatever to a statement that it took "three (sic) men to guard this one city policeman" (R. 29). Thereafter he said he didn't know anything about it (R. 45). However, Charles Moore, a member of the Miners' Relief Committee, testified that he and other pickets had in fact guarded Kilburn's home one night (R. 116).

Luttrell denied, and the defense did not prove that Luttrell had an outside job guarding a mine operator's home (R. 29).

The Trial Court instructed the jury that the defamatory statements made by Petitioner about Sheriff Combs were:

> "'The High Sheriff has hired 72 deputies at one time, more than ever before in history; most of them hired because they wanted to carry guns. He, Sheriff Combs, is also a mine operator—in a recent Court decision he was fined $5,000 for intentionally blinding a boy with tear-gas and beating him while he was locked in a jail cell with his hands cuffed. The boy lost the sight of one eye completely and is nearly blind in the other. Before the trial Sheriff Combs offered the boy $75,000 to keep it out of court, but he refused. Then for a few thousand dollars Combs probably bought off the jury. The case is being appealed by the boy to a higher court—he wants $200,000. Combs is now indicted for the murder of a man—voluntary manslaughter. Yet he is still the law in this county and has the support of the rich man because he will fight the pickets and the strike. The same is true of

the State Police. They escort the scabs into the mines and hold the pickets at gunpoint'" (R. 122-123).

Sheriff Combs conceded the truth of many of the statements. He admitted that he was a mine operator, while acting as High Sheriff (R. 71, 75) and that he and the State police escorted miners through the picket lines (R. 75). He admitted that a boy was beaten and gassed, while in jail in his (the Sheriff's) custody, and that the boy recovered a judgment against him for $5,000, because of the beating (though he denied that he was present at the time the boy was injured and the tear gas was used) (R. 78, 72). The Sheriff also admitted that he was under indictment for manslaughter, as stated in the Notes (R. 78) and that he had not been removed from office (R. 72).

Sheriff Combs also said that he never had as many as 72 deputies, and that he did not hire deputies "exactly" because they wanted to carry guns. (He said *he* wanted them to carry guns) (R. 71). The Sheriff admitted, however, to having about 48 deputies "on the books", none of whom were unemployed miners (R. 77, 76). The record does not reveal why an issue was made with respect to the number of persons officially and unofficially deputized by the Sheriff, for it was conceded that it had been the practice, "if somebody wants to be a deputy sheriff, why, they kind of put 'em on" (R. 34).

The Sheriff denied, and the defense did not prove, that $75,000 was offered in settlement of the charges against the Sheriff, and that he "probably bought off" the jury (R. 72).

The Petitioner was also charged with having made the following defamatory statement about Mrs. Nolan:

> " 'The town newspaper, the Hazard Herald, has hollered that "the commies have come to the mountains of Kentucky" and are leading the strike. The Herald was the recipient of over $14,000 cash and several truckloads of food and clothing which were sent as the result of a CBS-TV show just before Christmas. The story was on the strike and aid was supposed to be sent to the pickets in care of the Hazard Herald, however, the editor, Mrs. W. P. Nolan, is vehemently against labor—she has said that she would rather give the incoming aid to the merchants in town than to the miners. Apparently that is what she has done, for only $1,100 of the money has come to the pickets, and none of the food and clothes. They are now either still under lock and key, or have been given out to the scabs and others still' " (R. 123).

Mrs. Nolan admitted that her newspaper, The Hazard Herald, reported that the miners' strike was fomented by Communists and that her paper published the quoted statement (R. 55). She admitted that the Hazard Herald received, not $14,000 but about $20,000, and some food and clothing, as a result of a televised program about unemployed miners (R. 56); and that only $1,100 of the money was paid to the pickets (R. 65). She said that she did not know whether the money, food and clothing received by the Hazard Herald had been distributed to scabs (R. 52).

The charges against Ashton came on for trial before the Perry Circuit Court of the Commonwealth of Kentucky on September 10, 1963. The jury was unable to reach a verdict and the case was continued (R. 7-8). The case was reached again for trial on November 21, 1963. There was no evidence at the second trial that the pamphlet "Notes

on a Mountain Strike" (in which the alleged libels were printed) was distributed by the Petitioner Ashton or by any other person. A number of copies were found by the police in a room in a tavern and all were seized by the police (R. 26). Ashton was in the room when the pamphlets were found and taken (R. 26). Mrs. Nolan said she *believed* her husband found a copy of the Notes in her door, but did not know who placed it there (R. 53). She was unable to state when the pamphlet was found because, as she put it, "We had gotten so used to it" (i.e. to such communications) (R. 53).

There was also testimony that 50 or 60 copies of the Notes on a Mountain Strike were "prepared to be mailed" when they were taken by the police (R. 28). The Police Chief, Luttrell, admitted, however, that he did not know of anyone who received a copy of the paper other than the complaining witnesses and the police who were sent to pick up the copies (R. 40-41).

Before the jury retired after the second trial, the Court advised the jury "that criminal libel is defined as any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act, which, when done, is indictable" (R. 125). The jury returned a verdict of guilty, concurred in by 10 of its 12 members,[2] and fixed Ashton's punishment at six months in jail and a $3,000 fine (R. 144, 9). A judgment in conformity with the verdict was recorded in the Court's Book of Criminal Trials on November 21, 1963 (R. 8-9). The judgment of conviction

[2] The trial minutes did not show the number of jurors who agreed upon the verdict. The Attorney General for the Commonwealth stipulated, on the argument of the appeal, that only 10 of the jurors had in fact concurred in the verdict of guilty.

was affirmed by the Court of Appeals of Kentucky on June 18, 1965 (R. 158).

Summary of Argument

I. The Petitioner Ashton was convicted of conduct made criminal by the common-law of Kentucky. The elements of the crime had been discussed in only six reported opinions before Ashton was indicted, and the definitions of the crime varied in each of the opinions. None of the definitions of the crime in the reported cases is clear or comprehensive, or has the definiteness and clarity that the Constitution requires of a penal law.

The common-law crime of libel was defined in the Trial Judge's instructions to the jury as a writing "calculated to create disturbances of the peace". The Trial Court's definition is based on the ancient notion that a person insulted will resort to arms or violence to vindicate his honor. The premise of the law is no longer tenable and it attributes guilt to an accused because another person may use violence against him. The Trial Court's definition also violates the requirements of due process because of its vagueness.

The common-law crime of libel as it was redefined in this case by the Kentucky Court of Appeals makes all *per se* libel criminal, if uttered maliciously. Under that definition personal calumny that does not in any way affect the public interest may be punished as a criminal offense. That interpretation of the law offends the constitutional guarantee of freedom of the press, which prohibits the punishment of any communication that does not present a clear, imminent and serious danger to the public welfare.

II. The Kentucky Court of Appeals, in affirming Ashton's conviction, acknowledged that the concept of criminal libel as defamatory writing that tends to create a breach of the peace, is obsolete and unconstitutional. In an attempt to cure the constitutional infirmity of the law as it was interpreted when Ashton was convicted, the Court of Appeals, in its opinion affirming Ashton's conviction, modified the definition of the crime. An appellate court may change a law by reinterpreting it but it may not, in a case on review, give retroactive effect to the change where that will work an injustice to the appellant. The affirming of Ashton's conviction under a changed concept of the law was a denial of due process because it in effect sanctioned Ashton's imprisonment under an unconstitutional law, and denied him his right of appeal with respect to the validity of the law as it was understood and applied by those who convicted him.

III. Ashton was accused of criminally libelling three people. The statement made about one of them, Mrs. Nolan, was accurate in all essential respects. One cannot be punished for defamation if the facts in his statement are accurate, even if the statement is made maliciously. Since the jury's general verdict of guilt may have been based on the finding that Mrs. Nolan had been libelled, Ashton's conviction must be set aside.

IV. Ashton was convicted of making libellous statements about the official conduct of a High Sheriff and a Chief of Police. There was no proof that Ashton made the statements because of any personal feeling against the officers or that he believed or had reason to believe that his statements were false. The Court below held that Ashton's fail-

ure to ask the Sheriff and the Police Chief if the statements about them were true, was sufficient evidence of malice. The failure to make such inquiry may have been evidence of negligence, but it was not constitutionally sufficient evidence of evil intent to support a conviction of criminal libel.

V. The pamphlet said to be libellous was not distributed in quantity. Ashton delivered copies of the pamphlet to two or three policemen when they asked for them. The circumstances under which the police asked for the pamphlet justified the belief that Ashton was not at liberty to refuse their requests. The publishing of the alleged libel was therefore not voluntary or malicious and such limited distribution of a defamatory statement, as was made here, may result in a private injury but not in a public wrong punishable as a crime.

VI. The Court is urged to reconsider its prior ruling that, if constitutional safeguards are afforded in a proper case there may be a criminal prosecution for defamation of public officials with respect to the performance of their official duties. It is submitted that criticism of the work of government authorities should be completely privileged.

POINT I

Ashton's conviction of common-law criminal libel was a violation of the constitutional guarantees of due process and of freedom of the press because of the vagueness and breadth of the law, and because it provided for punishment of communications that do not present a danger to the state or the public welfare.

There is an ancient maxim that where the rule of law is uncertain there is no law. It is still sound. If a penal law is so vague that men of common understanding cannot know with reasonable certainty the conduct it condemns, then the meaning and comprehension of the law must be redetermined in each case. There is no assurance of consistent application, and no protection against harsh and discriminatory enforcement of such a law, and its meaning may change as different persons are called upon to enforce or interpret it. In consequence the rule is not by law but by the men in authority. *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87; *Cox* v. *Louisiana*, 379 U. S. 536, 579 (Mr. Justice Black concurring). The conviction of an accused under such law is obviously not with due process of law in accordance with the commands of the Fifth and Fourteenth Amendments. *Giaccio* v. *Pennsylvania*, —— U. S. —— (decided January 19, 1966); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 283-284; *Jordan* v. *De George*, 341 U. S. 223, 239, 240; *Musser* v. *Utah*, 333 U. S. 95, 97; Due Process Requirements of Definiteness in the Statutes, 62 Harv. L. R. 77.

When a vague law makes publishing a penal offense, the law must also be condemned as infringing the right of

communication guaranteed by the First and Fourteenth Amendments. *Stromberg* v. *People of the State of California,* 283 U. S. 359, 369; *Herndon* v. *Lowry,* 301 U. S. 242, 258; *Thornhill* v. *Alabama,* 310 U. S. 88, 97-98; *Winters* v. *New York,* 333 U. S. 507, 509; *Speiser* v. *Randall,* 375 U. S. 513; *Bagette* v. *Bullitt,* 377 U. S. 360, 372; The Void for Vagueness Doctrine in the Supreme Court, 109 U. of Pa. L. R. 67, 81. As Mr. Justice Brennan wrote for the Court in *Smith* v. *California,* 361 U. S. 147, 151, ". . . this Court has intimated that *stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech;* a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser" (emphasis ours). See also *Speiser* v. *Randall,* 375 U. S. 513, 526.

A. The Kentucky Common-law of Criminal Libel as It Was Declared in Earlier Cases and by the Kentucky Court of Appeals in This Case, Is Unconstitutionally Vague, and Violates the Constitutional Guarantee of Freedom of the Press in Punishing Expression That Does Not Present a Serious and Imminent Danger to the Community.

The Petitioner Ashton was sentenced to six months in prison and was fined $3,000 (R. 144) for printing a pamphlet said to have been prohibited by the common-law of Kentucky (R. 145). The Kentucky common-law, as the following analysis of its sources will show, did not and does not furnish any adequate standard for determining the guilt or innocence of anyone accused of criminal libel. Whether a particular statement fell or falls within the condemnation of the law was and is left to the notions of the trial jury in each case.[3]

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[3] Under the Kentucky Constitution the trial jury in a libel case determines the law and the facts under the Court's direction (Section 9, Constitution of Kentucky, p. 3 of this brief).

The Court below indicated that there may be some question with respect to whether the Constitution requires certainty in common-law crimes as it does in criminal statutes (R. 146). We believe greater certainty is required when an act is made criminal by the common-law. Legislation is, presumably, a direct expression of the popular will and of the public policy. The common-law has its origin in decisions of judges based, at least initially, on personal concepts of natural-law and justice. Common-law Crimes in the United States, 47 Col. L. R. 1332. See *Cantwell* v. *Connecticut,* 310 U. S. 296, 306-308; *Pierce* v. *U. S.,* 314 U. S. 306, 311. In *Bridges* v. *California,* 314 U. S. 252, the Court said (p. 260):

> "It is to be noted at once that we have no direction *by the legislature* . . . that publications . . . should be punishable. As we said in Cantwell v. Connecticut, 310 US 296, 307, 308, such a 'declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations.' But as we also said there, the problem is different where 'the judgment is based on a common law concept of the most general and undefined nature.' Id. 308. Cf. Herndon v. Lowry, 301 US 242, 261-264." (emphasis ours)

We are not concerned here with a common-law doctrine that, because of number of consistent interpretations by the Courts, acquired definite and concrete meaning so that all within its purview have a clear concept of its meaning. The definitions and canons of the common-law crime of libel in Kentucky, were, prior to the instant case, set out in six cases decided during the years from 1888 to 1927. English precedent cannot be used to determine the reach of the

Kentucky common-law, for as the Court of Appeals said in its opinion below, Kentucky broke from the English traditional law of libel (R. 150) and established its own common-law principles.

There is considerable variation in the definitions of criminal libel in the few opinions on the subject in Kentucky. None of the opinions enable those governed by the law to draw a line between the language that the law punishes and the language it permits. Chief Justice Moremen and Judges Stewart and Milliken dissenting in the Court below, wrote:

> ". . . since the English common law of criminal libel is inconsistent with constitutional provisions, and since no Kentucky case has redefined the crime in understandable terms, and since the law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it should not be enforced as a penal offense in Kentucky." (R. 158)

Tracy v. *Commonwealth,* 87 Ky. 578 (1888), the first recorded case in Kentucky in which the existence of the common-law crime of criminal libel was acknowledged, defined criminal libel as:

> "a public wrong. The publication is in effect a breach of the peace; it produces public mischief and for that reason is an indictable offense. It is a breach of the peace whether published as to one or more persons." (87 Ky. at 584)

A related definition of the crime was given in *Provident Sav. Life Assur. Soc.* v. *Johnson,* 115 Ky. 84 (1903), a

civil suit for malicious prosecution. The Court there held (p. 89):

> "a criminal libel is committed by any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act which, when done, is indictable."

The statements that the publications condemned are "in effect a breach of the peace" or are "calculated to create disturbances of the peace" do not, obviously, give any indication of the kind of communication that the law forbids. Cases discussing the vagueness and impropriety of that standard are examined in subdivision B of this Point. All of the other opinions in Kentucky that discuss the elements of the common-law crime of criminal libel,[4] including the opinion of the Kentucky Court of Appeals in this case, hold directly or connote that one may be held criminally responsible for *every* libel *per se* made with malice (that is, made with knowledge that the statement is false, or made without good reason to believe the statement to be true).[5]

In *Browning* v. *Commonwealth,* 116 Ky. 282, the Court said (p. 285):

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[4] *Smith* v. *Commonwealth,* 98 Ky. 437 (1895); *Browning* v. *Commonwealth,* 116 Ky. 282 (1903); *Commonwealth* v. *Duncan,* 127 Ky. 47 (1907); *Cole* v. *Commonwealth,* 222 Ky. 350 (1927). The Court below also cited *Yancey* v. *Commonwealth,* 135 Ky. 207 (1909) as one of the Kentucky cases that has recognized the common-law crime. However, the elements of the crime are not discussed in the opinion.

[5] In its opinion below the Court of Appeals of the Commonwealth of Kentucky wrote "in *Riley* v. *Lee,* 88 Ky. 603, 11 ALR 586, malice was defined as the intentional publication of defamatory matter 'without justifiable cause'. This was a civil suit but it is a broad description of the mental state which constitutes actual malice in criminal libel" (R. 152).

> "*Any defamatory words* calculated to injure or degrade the reputation of a person in society when written or published maliciously are libelous . . . and the law is equally well settled that *where a defamatory libel on the character of an individual will support an action for damages, the publication amounts to an indictable offense,* inasmuch as it tends to provoke violence and disturb the peace of society" (emphasis ours) (116 Ky. at 285).

Cole v. *Commonwealth,* 222 Ky. 350 (1927) the most recent Kentucky case on the subject (prior to the one at bar), which was cited with approval in the opinion below (R. 151), defines criminal libel as:

> "*any* false and malicious publication, which tends to blacken the memory of one who is dead, or to degrade or injure one who is alive, or bring him in contempt, hatred, or ridicule, or which accuses him of any crime punishable by law, or of any act odious or disgraceful to society." (emphasis ours) (222 Ky. at 358)

And the Court of Appeals of the Commonwealth wrote, in its opinion in this case:

> "As we have heretofore indicated, the common law crime of criminal libel recognized in Kentucky is basically the publication of a defamatory statement about another which is false, with malice." (R. 151)

Libels *per se* in Kentucky have been defined as "words that sound to disreputation of the persons spoken of . . ." *Sweeney & Co.* v. *Brown,* 60 S. W. 2d 381. Such libels include *any* false publication that would "blacken the memory of one who is dead . . . or injure one who is alive" (*Cole* v.

Commonwealth, 222 Ky. 350, 358) or "prejudice one in his calling, trade or profession . . . or that might cause one to be disinherited" (*Williams* v. *Riddle,* 145 Ky. 459, 462). Under the prevailing definition of common-law criminal libel in Kentucky, one is guilty of a crime punishable by imprisonment for a year and a fine of $5,000 if he writes, knowing the statement to be untrue, that a person's ancestor was obnoxious,[6] or that a barber is careless, or that a carpenter is incompetent, or that a person does not respect his living parents, or that a person is a hypocrite,[7] or that one filed a motion *in forma pauperis,*[8] or that one did not pay a store bill and it was necessary to send a bill collector to his home,[9] or that there was a mortgage due on a car that one sold free of lien.[10]

The sweep of the Kentucky criminal law is so broad, and it punishes such trifling abuse of the right of expression, that the law must for those reasons fall as an unwarranted invasion of the right of the press. It is a commonplace that communication cannot be punished unless it is of such character that its utterance would create a serious and present or imminent danger of substantive evil to the State or to the general welfare. *Herndon* v. *Lowry,* 301 U. S.

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[6] Apparently one may be guilty of criminal libel for insulting the memory of a deceased person, no matter how long he has been dead, so long as there are surviving relatives who may be offended. See discussion of common-law criminal libel in *State* v. *Haffer,* 94 Wash. 136, 140-141 in which the Court sustained the conviction of a defendant in 1916 for publishing an article exposing the memory of President George Washington to hatred, contempt and obloquy.

[7] *Shields* v. *Brooks,* 238 Ky. 678.

[8] *Metzger* v. *Washington Post Co.,* 40 App. D. C. 565.

[9] *Thompson* v. *Adelberg & Berman,* 186 Ky. 487.

[10] *Eby* v. *Wilson,* 289 S. W. 639.

242; *Pennekamp* v. *Florida,* 328 U. S. 331; *Terminiello* v. *Chicago,* 337 U. S. 1. As Mr. Justice Black wrote in *Bridges* v. *California,* 314 U. S. 252 at p. 263:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression . . . They do no more than recognize a minimum compulsion of the Bill of Rights."

And as the Court said in *Thomas* v. *Collins,* 328 U. S. 331, 353, "Only the gravest abuses endangering paramount interests, give occasion for permissible limitations. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction . . ."

The assumption, made by some state Courts, that libellous statements are not within the protection of the First and Fourteenth Amendments and can, therefore, be punished without a showing of clear and present danger, is unfounded. The Court wrote in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 269 "we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law. N. A. A. C. P. v. Button, 371 US 415, 429. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."

See also *Garrison* v. *Louisiana*, 379 U. S. 64, 67 (footnote 3), 70.

Most of the publications that the Kentucky criminal law punishes are not likely to produce any harm to the public or even any serious injury to the individuals libelled. In *Garrison* v. *Louisiana*, 379 U. S. 64, the Court (at pp. 69-70) quoted with approval the following statement in the Model Penal Code of the American Law Institute:

> *"It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit.* Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security . . . It seems evident that personal calumny falls in neither of these classes in the USA, that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country . . ." (Emphasis ours.)

B. The Definition of the Offense of Criminal Libel in the Trial Judge's Charge to the Jury in This Case Was Unconstitutionally Vague, and It Violated the Requirements of Due Process in Attributing Guilt to a Writer Because His Readers' Reaction Might Be Violent.

The Trial Judge advised the jury that Ashton was guilty if the statements about Luttrell, Combs and Mrs. Nolan were "false and libellous" and were written to injure and disgrace them (R. 125). He then said:

> "The Court further instructs the jury that criminal libel is defined as any writing calculated to create dis-

> turbances of the peace, corrupt the public morals, or lead to any act, which, when done, is indictable." (R. 125)

That was the only explanation that the jury received of the meaning of the term "libel" or "libellous". The jury was left free to determine whether the language used in the pamphlet Notes on a Mountain Strike would *be likely*[11] to influence the reader to breach the peace or to commit a criminal or an immoral act. In *Cantwell* v. *Connecticut*, 310 U. S. 296, the appellant Cantwell was convicted on one count, of the common-law crime of inciting a breach of the peace. He was charged with having played, in the hearing of Catholics on a public street, a phonograph record which bitterly attacked the Catholic religion and church. The Court held, in reversing Cantwell's conviction (p. 308):

> "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquillity. It includes not only violent acts but acts and words likely to produce violence in others . . . [A] state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions. *Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.*" (Emphasis ours.)

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[11] We must assume that the word "calculated" in the Trial Court's definition refers to the probable consequence of the language, and not to the writer's intent, for his intent alone could not be punished.

In *Winters* v. *New York,* 333 U. S. 507, 518-519 (1948), the Court held unconstitutionally vague a statute that prohibited the publishing of material "so massed as to become vehicles for inciting violent and depraved crimes against the person." The Court found "the specification of publications prohibited from distribution, too uncertain and indefinite" to sustain any criminal conviction (333 U. S. at p. 519). Although the language of the statute in the *Winters* case was, we believe, more informative than the definition in the instant case, the Court there found it was impossible for those subject to the law, or those charged with its enforcement, to know where to draw the line between allowable and forbidden publications, and as a result innocent conduct might be punished, or a person might be dissuaded from publishing proper material in the belief that it came within the ambit of the penal law.

"The clause," Justice Reed wrote, in *Winters* v. *New York,* 333 U. S. at p. 519, in language descriptive of the Trial Court's instruction in this case (that "libel is . . . any writing calculated to create disturbances of the peace"):

> "proposes to punish the printing and circulation of publications that courts or juries may think influence generally persons to commit crimes of violence against the person . . . 'It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against.' "

In *Garner* v. *Louisiana,* 368 U. S. 157, Mr. Justice Harlan wrote in his concurring opinion, in language also applicable to the Trial Court's definition of criminal libel in this case (368 U. S. 157, at p. 202):

> "But when a State seeks to subject to criminal sanctions conduct which, except for a demonstrated paramount state interest, would be within the range of freedom of expression as assured by the Fourteenth Amendment, *it cannot do so by means of a general and all-inclusive breach of the peace prohibition.* It must bring the activity sought to be proscribed within the ambit of a statute or clause 'narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State.'" (Emphasis ours.)

See also *Thornhill* v. *Alabama,* 310 U. S. 88, 105; *Edwards* v. *South Carolina,* 372 U. S. 229, *Henry* v. *Rock Hill,* 376 U. S. 776 and *Cox* v. *Louisiana,* 379 U. S. 536; *Garrison* v. *Louisiana,* 379 U. S. 64.

Defining a criminal libel as a breach of the peace is a reflection of the view, prevalent during the 14th to the 17th centuries, that a derogatory statement will provoke violence. Libel was considered a public wrong because it was assumed that the person who had been derogated, and his friends and family, would seek private retribution and as a result, cause a disturbance of the peace of the community.[12] *Garrison* v. *Louisiana,* 379 U. S. 64, 68-69; Brant, Seditious Libel: Myth and Reality, 39 N. Y. U. L. R. 1; Lovell, The Reception of Defamation By the Common Law, 15 Vand. L. R. 1051. Whether a defamation will enrage one to the point of violence depends, not on the nature of the

[12] As Coke wrote in his comment on "The Case de Libellis Famosis or of Scandalous Libels", 3 Coke 254 (1826 ed.), "for although the libel be made against one, yet it incites all those of the same family, kindred or society, to revenge and so tends, *per consequens* to quarrels and breach of the peace and may be the cause of shedding of blood and of great inconvenience . . ." Constitutionality of the Law of Criminal Libel, 52 Col. L. R. 521, 522.

insult, but on the temperament of the person insulted. Applying contemporary community standards, it is doubtful that any libel will arouse the "average reasonable prudent man" to break the peace. As Mr. Justice Brennan wrote for the Court in *Garrison* v. *Louisiana*, 379 U. S. 64, 69:

> "... Changing mores and the virtual disappearance of criminal libel prosecutions lend support to the observation that '... under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation.' Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 924 (1963)."

It is doubtful that any law, even one precisely worded, can constitutionally punish a publication because the publication may lead to a breach of the peace. If the disorder or disturbance of the peace arises from the violence of the audience's reaction, the authorities are obliged to restrain the audience, not to prohibit the speech or expression. As Zacharia Chafee wrote in Free Speech in the United States (1941) at p. 151, "It makes a man criminal simply because his neighbors have no self control and cannot refrain from violence." See also *Kunz* v. *New York*, 340 U. S. 290, 294, 295; *Terminiello* v. *Chicago*, 337 U. S. 1; *Hague* v. *C. I. O.*, 307 U. S. 496, 516.

Terminiello v. *Chicago*, 337 U. S. 1, involved an ordinance that, as construed, punished a statement as a breach of the peace "if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, ..."

The Court said, in holding the law unconstitutional (337 U. S. 4):

> ". . . a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, *Chaplinsky* v. *New Hampshire*, supra (315 US, pp. 571, 572), is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest . . . There is no room under our Constitution for a more restrictive view."

If an utterance can be prohibited because it *may* arouse an audience to violence, then, as John Stuart Mill noted, the "least educated and most intemperate citizens would become the arbiters of permissible expression." John Stuart Mill, *On Liberty*, Chapter 2 (MacMillan). As Chief Justice Hughes said in *Near* v. *Minnesota*, 283 U. S. 697, 722:

> "The danger of violent reactions becomes greater with effective organization of defiant groups . . . and if this consideration warranted legislative interference with the national freedom of publication, constitutional protection would be reduced to a mere form of words."

We are not suggesting that incitement to violence may not be punished. The Kentucky law of criminal libel is directed at injury to reputation, not at the direct instigation of public disorder. See *Yates* v. *United States*, 354 U. S. 298, 318.

Beauharnais v. *Illinois*, 343 U. S. 250, cited in the opinion of the Kentucky Court of Appeals (R. 148, footnote 8) presented a different question from the one under consideration. In *Beauharnais*, the Court "by the narrowest of margins" [13] sustained a conviction under a statute that made it unlawful to publish material portraying a racial or religious group as depraved or criminal. The defendant in that case handed out leaflets at a public meeting of a White Circle League, and instructed those present to distribute the leaflets on the street corners in Chicago. In the leaflets negroes were described as rapists and thieves, addicted to marijuana. The majority of the Court, in upholding the defendant's conviction in *Beauharnais*, noted that the statute was narrowly drawn to reach a specific evil, was read in "the animating context of well-defined usage" and was designed to prevent a serious and imminent danger, namely, racial strife and riot, for Illinois had "been the scene of exacerbated dissension between races often flaring into violence and destruction." (343 U. S. 253, 259-261)

The disparities between the law involved in *Beauharnais* and the Kentucky law of criminal libel as it was construed by the trial judge in this case, mark the constitutional deficiencies of the Kentucky law. In *Beauharnais* the law was "narrowly drawn to punish specific conduct", namely,

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[13] *Garrison* v. *Louisiana*, 379 U. S. 64, 82, Mr. Justice Douglas concurring.

racial or religious vilification in which the racial or religious group was portrayed as depraved or criminal. The Kentucky law penalizes *all* disparaging statements "sounding to the disreputation of a person", that are made with knowledge of their falsity or without cause to believe them true. In *Beauharnais* the language of the statute was further limited in its application by consistent usage and a considerable number of uniform State Court interpretations. The definitions of the crime set out in the Kentucky opinions do not provide any reliable guide lines for the application of the law in a given case. The Kentucky law has been interpreted only six times in the 75 years following its pronouncement, and each interpretation differed from the others. The libels punished in *Beauharnais* presented a serious threat to public order because, under circumstances then existing, they were tantamount to a direct incitement to riot. The injuries sustained because of statements punished by the Kentucky common-law, are personal and for the most part slight.

The Trial Judge also advised the Jury that Ashton was guilty of a crime if he published a writing "calculated to . . . corrupt the public morals" (R. 125). That phrase also has been held too indefinite to meet constitutional requirements when used in a law regulating speech or press. See *Kingsley International Pictures Corp.* v. *Regents,* 360 U. S. 684; *Musser* v. *Utah,* 333 U. S. 95; *Commercial Pictures Corp.* v. *Regents,** 346 U. S. 587 (decided under the caption *Superior Films* v. *Dept. of Education of State of Ohio*); *Holmby Productions, Inc.* v. *Vaughn,** 350 U. S. 870.[14]

[14] The opinions marked with an asterisk are memorandum opinions. The statutes held unenforceable will be found in the opinions of the lower courts.

POINT II

The criminal libel law as applied by the Trial Court was unconstitutional. The affirmance of Ashton's conviction under a narrower interpretation of the law in conflict with that given in the Trial Court's charge to the jury, was a denial of due process and of equal protection of the laws.

The trial judge in defining criminal libel as "any writing calculated to create disturbances of the peace" (R. 125) was following precedent set out in several opinions of the highest court of the Commonwealth. Four of the six Kentucky cases that discuss the ingredients of the common-law offense, describe a libellous publication as "in effect a breach of the peace",[15] as writing that tends "to provoke violence and disturb the peace of society",[16] and as writing "calculated to create a disturbance of the peace".[17]

More than a year and a half after Ashton was convicted (R. 8, R. 144) the Kentucky Court of Appeals declared, in affirming his conviction, that the "broad common-law concept of what constituted 'a breach of the peace' *is no longer a constitutional basis for imposing criminal liability*" (R. 151). "The offense", the Court said, "is no longer founded, as it once was in England, upon the tendency of the defamatory words to cause a 'breach of the peace' or to induce others to commit a public offense" (emphasis ours) (R. 150). And, the Court of Appeals added in its opinion below:

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[15] *Tracy* v. *Commonwealth*, 87 Ky. 578.

[16] *Browning* v. *Commonwealth*, 116 Ky. 282.

[17] *Commonwealth* v. *Duncan*, 127 Ky. 47, and *Prov. Sav. Life Assurance Soc.* v. *Johnson*, 115 Ky. 84.

> "None of our Kentucky cases based the criminality of the act upon the tendency to cause a 'breach of the peace' or the commission of an 'indictable offense.' *To the extent they defined the defamatory nature of the words in these terms, they are obsolete.*" (R. 151) Emphasis ours.

The Trial Judge in explaining the nature of the crime to the Ashton jury used the "obsolete", "unconstitutional" definition. He was unaware, and had no way of divining, that the prior opinions of the Kentucky Court of Appeals were in error to the extent that they characterized criminal libels as writings that caused breaches of the peace. The earlier opinions dealing with criminal libel had not been overruled or in any way modified, before Ashton was tried or before his conviction was affirmed. It is true, as the Court below observed, that in its most recent opinion on the subject *Cole* v. *Commonwealth,* 222 Ky. 350 (1927), "no mention is made of the possibility of public disturbance which might be incited by the publication." (R. 151). The Court's failure in *Cole* to refer to that element of the crime was not an intimation that the law had been changed, for the opinion in *Cole* cited *Commonwealth* v. *Duncan,* 127 Ky. 47 with approval, and in the latter case criminal libel was defined, in part, as a writing "calculated to create disturbances of the peace, to corrupt the public morals or to lead to any act which when done is indictable." (127 Ky. at p. 53)

Whether the Trial Judge's interpretation of the law was correct, the Ashton jury derived its knowledge of the law from his instructions, and the jury was required to apply the Court's statement of the law to the facts of the case *Walston* v. *Commonwealth,* 32 Ky. L. Rep. 535. It

must be assumed that the jurors found Ashton guilty because they believed his statements "were calculated to cause disturbances of the peace" or would lead to an indictable offense. Ashton's conviction was based on a version of the law that was unconstitutional and that the Kentucky Court of Appeals held unconstitutional.

The Court of Appeals had the authority to reinterpret the law on the appeal in this case, but the wrong done in convicting Ashton under an unconstitutional version of the law was not cured by a later change in the law.[18] *Shuttlesworth* v. *Birmingham,* 382 U. S. 87; *Bailey* v. *Alabama,* 219 U. S. 219, 234-235. Since Ashton was not convicted under an operative law, his conviction could not be validated by a changed concept of the law on appeal.

In *Shuttlesworth* v. *Birmingham,* 382 U. S. 87, the Petitioner was convicted under a city ordinance (Section 1142) which, given a literal construction, was unconstitutional because of its breadth and vagueness. After Shuttlesworth was found guilty, the Alabama Court of Appeals gave the ordinance "an explicitly narrow construction", thus removing the constitutional objection to it. On the appeal to this Court it was urged that Shuttlesworth's conviction was not under an obscure law because the ordinance as construed by the highest Court of the State was not ambiguous. But there was nothing in the trial record to indicate that the Court that convicted Shuttlesworth, interpreted the ordinance in the way that the Alabama Court of Appeals subsequently construed it. In an opinion written by Mr. Justice Stewart, the Court held, in reversing Shuttlesworth's conviction (382 U. S. 87):

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[18] As shown in Point I of this Brief, the law as reinterpreted by the Court of Appeals in this case is also unconstitutional.

"The present limiting construction of Section 1142 was not given to the ordinance by the Alabama Court of Appeals however until . . . two years after the petitioner's conviction in the present case. (382 U. S. 87, 91-92)

* * * * *

Because we are unable to say that the Alabama courts in this case did not judge the petitioner by an unconstitutional construction of the ordinance, the petitioner's conviction under Section 1142 cannot stand." (382 U. S. at p. 92)

In *Shuttlesworth* the conviction was reversed because of the *possibility* that the Trial Court adopted an unconstitutional construction of the law governing the offense. In the instant case there can be no doubt that Ashton was judged under an unconstitutional construction of the law.

The Court of Appeals, in changing the meaning of the law in its order affirming Ashton's conviction also denied due process and the equal protection of the laws in connection with Ashton's appeal to that Court. The appeal proceeding was available to all in similar circumstances as a matter of right. Kentucky Code of Criminal Procedure, §347 (p. 4 of this Brief). The appeal was as much a part of the process of law to which Ashton was entitled as any other. *Frank* v. *Magnum*, 237 U. S. 309, 327; *Cochran* v. *Kansas*, 316 U. S. 255, 258; *Griffin* v. *Illinois*, 351 U. S. 12, 18. The Kentucky Court of Appeals, in changing an essential element of the crime after Ashton was convicted, denied him the right of a hearing on appeal with respect to the constitutionality of the statute as it was applied in his case. As Mr. Justice Black wrote in the first

case entitled *Cole* v. *Arkansas*, 333 U. S. 196, 202, "To conform to due process of law petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court."

In the first *Cole* case, 333 U. S. 196, Cole's conviction was reversed because he had been tried and convicted of violating one section of the penal statute and his conviction had been affirmed by an appellate court under another section of the same statute. Thereafter Cole was retried and convicted again. On his second petition to this Court Cole contended that he was entitled to a reversal because the state Appellate Court's interpretation of the penal statute on the second appeal was in conflict with the Trial Court's construction. Cole argued that he had again, in effect, been tried under one law and that his conviction had been affirmed under another. The Court found in the second *Cole* v. *Arkansas*, 338 U. S. 345, that there was no substantive difference between the second Trial Court's construction of the statute and the construction given on the appeal from the second conviction. The Court said, however, that if Cole's charge had been supported by the record, he would have been entitled to prevail. *Cole* v. *Arkansas*, 338 U. S. 345, at p. 348. In the case at bar it cannot be doubted that the Trial Court's interpretation of the law was at variance with the one adopted by the Appellate Court.

The affirming of Ashton's conviction under a changed version of the law also offends due process because it deprived Ashton of the right to know the essential elements of the crime of which he was accused, in advance of his trial. One charged with offending against a penal law

cannot be compelled to assume the burden of a change in the meaning of the law by subsequent construction. *Connally* v. *General Construction Co.*, 269 U. S. 385, 391, 392-393, 395; *Thomas* v. *Collins*, 323 U. S. 516, 535. A retroactive change in the definition of the crime after one has been convicted of committing it denies both the opportunity to avoid offending the law and the opportunity to prepare the defense against the charge of violating it.

It is true that there is no absolute prohibition against the retrospective application of a decision that changes the law. See *Linkletter* v. *Walker*, 381 U. S. 618, *Tehan* v. *Shott*, —— U. S. ——, Jan. 19, 1966. The *Linkletter* and *Tehan* cases hold that a revised Court interpretation of existing law may be made prospective or retrospective *as the interests of justice dictate.* We believe the interests of justice and the due process clauses prohibit Appellate Courts from applying a new definition of a crime in a case on review, where the retroactive change results in the affirming of a judgment of imprisonment that had been imposed by unconstitutional means. *Shuttlesworth* v. *Alabama*, 382 U. S. 87; *Linkletter* v. *Walker*, 381 U. S. 618, 639 (footnote 20) (opinion of the Court) and at p. 645 (dissenting opinion); *James* v. *United States*, 366 U. S. 213; cf. *England* v. *Louisiana*, 375 U. S. 411, 422.

POINT III

Ashton's conviction of criminal libel violated the constitutional guarantee of freedom of the press because the statements made about the complaining witness, Mrs. Nolan, were true.

The statement said to be "libellous and defamatory" of Mrs. Nolan was:

> "'The town newspaper, the Hazard Herald, has hollered that "the commies have come to the mountains of Kentucky" and are leading the strike. The Herald was the recipient of over $14,000 cash and several truckloads of food and clothing which were sent as the result of a CBS-TV show just before Christmas. The story was on the strike and aid was supposed to be sent to the pickets in care of the Hazard Herald, however the editor, Mrs. W. P. Nolan, is vehemently against labor—she has said that she would rather give the incoming aid to the merchants in town than to the miners. Apparently that is what she has done, for only $1100 of the money has come to the pickets, and none of the food and clothes. They are now either still under lock and key, or have been given out to the scabs and others still,'" (R. 123)

To justify criminal prosecution for libel, the defamation must charge serious vice or disgraceful behavior or scandalous misconduct "which exceptionally disturbs the community's sense of security" *Garrison* v. *Louisiana,* 379 U. S. 64, 70. The charge against Mrs. Nolan does not affect the

security of the community and does not appear sufficiently grave to warrant imprisoning the person who made it.[19]

But the quoted language may not be held libellous for a more compelling reason—namely, because it was true in all essential respects. As Mr. Justice Brennan wrote for the Court in *Garrison* v. *Louisiana*, 379 U. S. 64, "We agree . . . 'If upon a lawful occasion for making a publication, he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice . . .' (379 U. S. at p. 73) . . ."

The Court below found: ". . . there was sufficient evidence that the statements accusing her (Mrs. Nolan) of a breach of trust in the distribution of certain funds were in essence false" (R. 145). The record does not support that determination. And in a case such as this one, where the State Court holds as a result of its decision on the facts, that a constitutional right has not been denied, this Court will make its own evalua 'on of the evidence. Any other rule would permit frustration of guaranteed rights by an erroneous finding of fact. *Wood* v. *Georgia*, 370 U. S. 375; *New York Times Company* v. *Sullivan*, 376 U. S. 254, 285, and cases there cited.

The evidence in the case, particularly Mrs. Nolan's testimony on cross-examination, reveals that the statement made about her was true in all material respects. The pamphlet, Notes on a Mountain Strike, stated:

(1) that the newspaper owned by the Nolans accused the Communists of fomenting the strike (*that was in fact the newspaper's position* (R. 55)).

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[19] See argument at pp. 21-23 of this Brief.

(2) that the newspaper received over $14,000 and food and clothing (*the paper received approximately $20,000 and food and clothing* (R. 55-56)).

(3) that the money was sent as a result of a television broadcast about the plight of miners in the area. (*Mrs. Nolan agreed that the money was contributed as a result of a television broadcast and admitted that one television program was "devoted almost exclusively to the unemployed coal miners"* (R. 56-57)).

(4) that Mrs. Nolan was against labor. Mrs. Nolan protested that she had no "feelings against" miners because they were on the picket line, but the following portion of her testimony revealed a different attitude:

"Q32. And Hazard and Perry County was one of the centers of this labor unrest. Now, from your own personal knowledge, don't you know that there was strikes; that there was picketing?

A. I have a different name for them, Mr. Combs.

Q33. What is your name for them?

A. I would rather not say.

Q34. Why?

The Court: Well, you have another name. Go ahead and tell the jury now. What is your name for them?

A. No, I'll not tell the jury.

The Court: Well, you will, or I will send you to jail.

A. Well, that's all right, if you want to.

The Court: You answer that question.

Q35. What is your name for these poor underprivileged, unemployed picketing coal miners, Mrs. Nolan?

A. They weren't unemployed at that particular time. They were people that had been worked out of jobs and things" (R. 59).

(5) that only $1100 of the money received by the newspaper was used to aid the striking pickets and none of the food and clothing was given to them (*the pickets received only $1100 from the fund and no food or clothing was distributed to them* (R. 65)).

(5) that food and clothing received as a result of the telecast was still undistributed and remained under lock and key (*some of the clothing was still undistributed at the time of the trial and was then in a warehouse under lock and key* (R. 66)).

The Trial Judge, in commenting on the alleged defamation of Mrs. Nolan, said (R. 97):

"She hadn't given the pickets but Eleven Hundred Dollars, and she hadn't distributed all of the things that had been sent. She does have part of them left, and what she's going to do with it, God Almighty only knows. I don't."

And the Trial Judge added that Ashton "came pretty close on Mrs. Nolan" (R. 97).

The Attorney General of the Commonwealth claimed in his brief in opposition to the Petition for Certiorari, that the statement about Mrs. Nolan in the pamphlet was in-

accurate in that: the money, food and clothing were *not* sent to the Hazard Herald as the result of a TV show on the strike (as stated in the pamphlet) but came as a result of another TV presentation; and that the aid was not "supposed to be sent to the pickets" (as set forth in the pamphlet) but was to be distributed to all needy persons.

Whether money was received as a result of one or another television show broadcast from the area, and whether the money sent to the television company (and paid over at Mrs. Nolan's request to The Hazard Herald Helping Fund (R. 57)) was intended primarily for the picketing miners or for all needy people in the area, was purely a matter of conjecture.[20] There was no proof that Mrs. Nolan's conclusion was the correct one or that the statement attributed to Ashton was false. Moreover, the punishment of such slight inaccuracies of expression—if they were inaccuracies—must be held an infringement of the right of the press for the Constitutional protection of communication is not limited to statements that are literally true in every detail.[21] The Court said in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, at pp. 271-272, ". . . erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive,' *N. A. A. C. P.* v.

[20] "Men are entitled to speak as they please in matters vital to them; errors in judgment or unsubstantiated opinion may be exposed but not through punishment for expression. Under our system of government counter argument and education are weapons available to expose these matters, not the abridgement of the right of free speech." *Wood* v. *Georgia*, 370 U. S. 375, 389.

[21] In *New York Times Co.* v. *Sullivan*, 376 U. S. 254, the Court said of statements that were allegedly false in minor respects (p. 289): "The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems . . ."

Button, 371 US 415, 433". See also *Near* v. *Minnesota,* 283 U. S. 697, 718; *Cantwell* v. *Connecticut,* 310 U. S. 296, 310; *Ernde* v. *San Joacquin County,* 23 Cal. 2d 146, 160; *Fort Worth Press* v. *Davis,* 96 S. W. 2d 416 (Tex.); *Smith* v. *Byrd,* 225 Miss. 331; Constitutionality of the Law of Criminal Libel, 52 Col. L. R. 521, 532 (1952).

The verdict of guilty in this case was a general one without any special finding. It is not possible to identify the particular statement for which Petitioner was convicted. The verdict must therefore be set aside for the jury may have found Ashton guilty in the belief that Mrs. Nolan had been libelled. In *Williams* v. *North Carolina,* the Court said, 317 U. S. 287, 291-292 (1942):

> "If one of the grounds for conviction is invalid under the Federal Constitution the judgment cannot be sustained . . . To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights."

POINT IV

The State failed to produce any evidence that the statements about the official conduct of the Chief of Police and the High Sheriff, were made with malice. Ashton's conviction therefore violated the constitutional guarantee of freedom of the press.

The right to criticize and condemn government policies and 'the stewardship of public officials' is fundamental to the democratic process. *New York Times Co.* v. *Sullivan,* 376 U. S. 254, p. 275. To ensure the free and uninhibited exercise of that right and duty, the First Amendment protects misstatements about the work of government officers, so long as the statements are not made with deliberate malice.

The statements that Petitioner allegedly published about the High Sheriff Combs, and the Chief of Police Luttrell, were unpleasant, and were inaccurate in part—(although substantially true). But they were made as part of a document written to describe the conditions then existing in Hazard and Perry Counties, and to call to account the public officials who were thought responsible.

In *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270, the Court spoke of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." and the Court concluded that neither factual error nor defamatory content, won both in combination "suffices to remove the constitutional shield from criticism of official conduct." 376 U. S. at p. 273.

"The constitutional guarantees," Mr. Justice Brennan wrote for the Court (p. 279), "require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' . . ." The Court thereafter emphasized (376 U. S. at p. 281) that "in such a case the burden is on the plaintiff to show actual malice in the publication of the article." The principles set out in the *New York Times* case were held applicable to criminal prosecutions for libel in *Garrison* v. *Louisiana*, 379 U. S. 64, in which the Court said (pp. 74-75): "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government."

If those in positions of power can stifle or punish criticism of themselves, then "the right of freely examining public characters and measures, and of free communication among the people thereon . . . the only effectual guardian of every other right" will be lost.[22] The Court will note that in the recent cases involving libel prosecutions, including the instant case, the proceedings were initiated by government authorities in reprisal against those who found fault with their conduct.[23] See Constitutionality of the Law of Criminal Libel, 52 Col. L. R. 521, 533 (1952); Keely, Criminal Libel and Free Speech, 6 Kan. L. R. 295 (1958).

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[22] From The Report on the Virginia Resolutions quoted in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 274.

[23] The High Sheriff and Police Chief testified that on the day after seeing the pamphlet that they found insulting, they swore out a warrant for Ashton's arrest (R. 78, 25).

In its opinion below the Kentucky Court of Appeals conceded that *New York Times Co.* v. *Sullivan*, 376 U. S. 254, and *Garrison* v. *Louisiana*, 379 U. S. 64, require a showing of actual malice to support a recovery in a civil action, and a conviction in a criminal case, for the libelling of public officials (R. 153). But the Court ruled (we believe erroneously) that *independent* proof of malice was not required (R. 153).

The only evidence of malice proffered at the trial was the testimony that Ashton did not make any effort to ascertain the truth from the three complaining witnesses, and that they would have told him the truth if he had asked (R. 29, 53, 74). The Kentucky Court of Appeals found that evidence sufficient to show that Ashton was motivated by actual malice because, it said, he "was a stranger in the community. He was not acquainted with the prosecution witnesses. He had not personally confronted them with their claimed misconduct. Some of the statements made about them were clearly defamatory and they were false. This was a period of strife between union and non-union miners, and the defendant (Ashton) and the prosecuting witnesses were in opposing camps." (R. 153-154; matter in parentheses ours.)

Petitioner's unfamiliarity with the place, and the fact that he didn't know the people, did not warrant the inference that he bore the Sheriff or the Police Chief any ill will. Nor may it reasonably be assumed that Petitioner was evilly disposed toward the complaining witnesses because they differed about a dispute between mine workers—in which Petitioner was not directly involved.

The inaccurate statements made about the High Sheriff and the Police Chief were not, in the light of the known and

admitted facts, so immoderate and defamatory that enmity towards the officials can be imputed. The High Sheriff had countenanced, and had been held liable for, extreme violence and brutality against a defenseless prisoner in his care (R. 71-72, 78). There was sufficient evidence of his responsibility for a homicide to justify a grand jury indictment against him (R. 72). The Chief of Police, if not directly responsible for the threat to kill Lieutenant Kilburn (whose views and sympathies were opposed to his own), was aware that it had been made and did nothing about it other than to repeat the threat (R. 121).[24]

Even if the evidence justified the conclusion that Ashton's report was motivated by animosity, the State did not offer any evidence to show that Ashton knew that his statements were not accurate. The constitutional protection afforded to misstatements about official conduct extends to words written in hatred, so long as the writer did not know that his statements were false. The criminal defamation statute involved in *Garrison* v. *Louisiana,* 379 U. S. 64, was held to incorporate constitutionally invalid standards because it "permitted a finding of malice based upon an intent merely to inflict harm, rather than an intent to inflict harm through falsehood." (379 U. S. at p. 73).

Ashton's failure to confront the Sheriff and the Police Chief with the statements about their misconduct is certainly not strange under the circumstances, and may not in any circumstance be held proof of actual malice on his part. The failure to check a primary source of information is at most proof of negligence, but not of an evil intent. The

[24] "People have good authority for believing that grapes do not grow on thorns nor figs on thistles" (*Coleman* v. *McLennan,* 78 Kan. 711, 739, quoted in *Garrison* v. *Louisiana,* 379 U. S. 64, 77).

Court, in *Garrison* v. *Louisiana*, 379 U. S. 64, held specifically that proof "that the exercise of ordinary care would have revealed that the statement was false," does not meet the constitutional requirement that malice be shown before such statement may be punished as a criminal libel. (379 U. S. at p. 135).* In *New York Times Co.* v. *Sullivan*, 376 U. S. 254, the Court found that the newspaper's failure to check the material it published, even against its own files, did not show malice with "the convincing clarity the constitutional standard demands" 376 U. S. at pp. 286-287. See also *Moity* v. *Louisiana*, 379 U. S. 201 (per curiam).

POINT V

The alleged libel was not communicated to the public, and it was not published voluntarily or maliciously. Ashton's conviction was therefore without due process and violated the constitutional guarantee of freedom of the press.

One cannot be imprisoned for merely composing an insulting statement. No wrong is committed until the defamation is circulated or communicated. Criminal sanctions may be imposed on expression only when it presents a serious danger and disturbs or threatens the community. (See argument at pp. 21-23 of this brief.) The manner in which a statement is communicated is as important a factor in determining the gravity of the danger it presents, as is

*The Court below held that publication of defamatory matter "without justifiable cause" constituted "actual malice in criminal libel" (R. 152). In *Garrison* v. *Louisiana*, 379 U. S. 64 the Court ruled that proof that a statement was not made "in the reasonable belief of its truth" did not satisfy constitutional demands (379 U. S. at pp. 78-79).

the nature of the information or misinformation in the statement.

In this case the pamphlet was "published" or delivered by Ashton to two or three local policemen. It was given to them at their request. The police officers who received the pamphlets were subordinates of Sam Luttrell, the Police Chief who supposedly had been defamed by the writing, and one of the officers was acting under Luttrell's direct order to bring him a copy of the pamphlet.

C. M. Begley, one of the city policemen, testified that in making a routine check in a room of a tavern on the evening of March 26, 1963, he saw Ashton working on the pamphlets (R. 80). They were then being prepared for distribution (R. 25, 28, 90). Begley asked Ashton for a copy of the pamphlet and Ashton handed one to him (R. 80-82). The following morning the pamphlet was shown to Chief Luttrell at police headquarters (R. 22). Luttrell then sent Patrolman Anderson Asher to the tavern to pick up another copy (R. 23-24). After Patrolman Asher returned with his copy of the pamphlet on March 27, 1963[25] a warrant for Ashton's arrest was secured. At the time Ashton was arrested on March 27th the other copies of the pamphlet were seized (R. 25-26). There was evidence that many copies of the pamphlet were prepared for mailing but

[25] Anderson Asher was acting as agent for Luttrell in receiving his copy of the pamphlet. In Kentucky, proof of publishing to a person other than the one defamed is required in a criminal prosecution for libel unless the indictment expressly charges that the defamatory matter was sent or delivered to the persons libelled with intent to provoke a breach of the peace. Roberson's New Kentucky Criminal Law & Procedure §1177 (2nd Ed. 1927). The indictment in this case did not make any such charge (R. 1).

they were taken by the police before they could be sent[26] (R. 27-28).

The Attorney General for the Commonwealth contended that the delivery of the copies of the pamphlet to Begley and Asher was a voluntary publication because Begley and Asher each separately testified, in strikingly similar language, that when he began to take a pamphlet from the top of the table in the tavern room (one on the 26th of March and the other on the following day), Ashton stopped him and got one from under the table and handed it to the officer (R. 80, 87). The volitional quality of Ashton's act may be judged from the following testimony given by Begley (Asher's statement was to the same effect):

> "Q41. When you asked this young man for this pamphlet, did you tell him that you were not acting as a policeman when you made the request?
>
> A. I didn't tell him nothin'. I just asked him for it.
>
> Q42. And you were standing there in uniform with your hat on?
>
> A. Yes, sir, I was.
>
> Q43. And he gave you one?
>
> A. Yes, sir, he did."[27] (R. 85)

Whether delivery of a writing to one, two or three policemen under such circumstances constitutes a publication,

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[26] It was also claimed that a copy of the pamphlet was found at Mrs. Nolan's door (R. 53). Mrs. Nolan did not know who placed it there (R. 53). It may have been delivered by police who seized all copies of the pamphlet that were found. In any event, as the Court correctly ruled, delivery to Mrs. Nolan could not be considered publication because she was a complaining witness (R. 30).

[27] It would seem that Ashton was following the adage that where there is no choice, we do well to make no difficulty.

so limited a distribution of an alleged libel may not be punished as a crime. Vilification, disclosed to a very few people whose judgments do not influence or affect the public, is a private injury and is not "appropriate for penal control" *Garrison* v. *Louisiana*, 379 U. S. 64, 69 (quoting Model Penal Code, Tent. Draft No. 13, 1961 sec. 250.7 Comments, 44). The Trial Judge in this case erred in instructing the jury that delivery of the pamphlet to one person, "a third party" other than the prosecuting witnesses, was sufficient proof of publication to justify conviction (R. 126).

Following the precepts of *New York Times* v. *Sullivan*, 376 U. S. 254, and *Garrison* v. *Louisiana*, 379 U. S. 64, in order to sustain a conviction for criminal libel, the publishing of the defamation must, to meet constitutional requirements, be voluntary, *and* with intent to inflict harm *and* it must be made in a manner that will injuriously affect the community. The evidence of the publishing of the pamphlet in this case was constitutionally insufficient to support a conviction, for there was no proof that the libel was published or that it was published intentionally, or that it was published with malice, or that it was distributed publicly.

POINT VI

Imposing punishment for inaccurate and derogatory statements about the official conduct of public officers violates the constitutional guarantees of freedom of the press.

The prevailing view of this Court, set forth in *New York Times* v. *Sullivan*, 376 U. S. 254, and in *Garrison* v. *Louisiana*, 379 U. S. 64, is that if constitutional safeguards are observed, there may be a criminal prosecution for the defaming of public officials with respect to their conduct in office. This case furnishes occasion for reconsideration of that view. See *New York Times* v. *Sullivan*, 376 U. S. 254, 293, 297 (concurring opinions of Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Goldberg) and *Garrison* v. *Louisiana*, 379 U. S. 64, 79 (concurring opinions of Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Goldberg); Emerson, Toward A General Theory of the First Amendment, 72 Yale L. J. 877, 924 (1963).

CONCLUSION

The order appealed from should be reversed, for:

1. The Kentucky law of criminal libel as applied in Ashton's case is unconstitutionally vague and is based on an obsolete concept that attributes guilt to an accused because of the tendency of others to commit acts of violence.

2. The Kentucky law of criminal libel as interpreted by the Court of Appeals of the Commonwealth of Kentucky is unconstitutionally vague and violates the constitutional guarantee of freedom of the press in punishing, as a criminal offense, private defamation that in no way affects the public welfare.

3. The Petitioner was convicted under a law that was unconstitutional as interpreted by the Trial Court; and the Appellate Court below denied Petitioner Due Process in affirming his conviction under a changed construction of the law in conflict with that of the Trial Court.

4. The statement allegedly libelling Mrs. Nolan was true, and the jury may have based its general verdict of guilt on the finding that she had been libelled.

5. There was no evidence that the defamatory statements, criticizing official conduct of public officers, were made with malice.

6. There was no acceptable evidence of publication of the libel.

7. The First Amendment prohibits a conviction for criminal defamation of the official conduct of public officers.

March 10, 1966.

Respectfully submitted,

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